U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 03 November 2005

BALCA Case No.: 2004-INA-00340
ETA Case No.: P2004-GA-04415164

In the Matter of:

GEORGIA-PACIFIC CORPORATION,
Employer,

on behalf of

ABBAS JAFFRI,
Alien.

Appearance: Mark J. Newman, Esquire
Troutman Sanders, LLP
Atlanta, Georgia
For the Employer and the Alien

Certifying Officer: Floyd Goodman
Atlanta, Georgia

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

John M. Vittone
Chief Administrative Law Judge

DECISION AND ORDER

This matter arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer of an application for alien labor certification. Permanent alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("the Act"), and Title 20, Part

656 of the Code of Federal Regulations.[1] We base our decision on the record upon which the Certifying Officer denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. § 656.27(c).

STATEMENT OF THE CASE

On December 19, 2002, Georgia Pacific Corporation ("Employer") applied for alien labor certification on behalf of Abbas Jaffri ("Alien") to fill the position of "Senior Technical Support Analyst". AF 124. Employer described the position as follows:

> Support and maintain Oracle RDB and Microsoft SQL Server databases in production & development environments. Responsible for Administration, Design, Installation, Backup/Recovery, Maintenance, Database tuning, Performance monitoring & Replication in SQL Server Environment. Creating databases, objects, stored procedures, triggers, security, BCP, High-Speed Backup & Recovery using knowledge of Transact SQL & able to Design, Develop, Integration & Implementation of databases using relational & object design & methodologies, Oracle DBI Replication, extractions software, Visual Basic & ASP development accessing legacy systems & supporting applications written in COAX toolset & optivision environment.

AF 124.[2] Employer's application further required three years of experience in the job offered or related occupation in "technical programming or support," along with a bachelor's degree (or foreign degree equivalent) in "computer science, MIS, Math, Bus. Admn. or related technical field." AF 124. Employer also requested Reduction in Recruitment ("RIR") processing.

On May 12, 2004, the Regional Certifying Officer ("CO") issued a Notice of Findings ("NOF") proposing to deny certification on the following grounds: (1) pursuant

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[2] It should be noted that Employer's description of the job to be performed on the ETA 750A, item 13 is verbatim to the Alien's description of his qualifications on ETA 750B, item 15. *See* AF 275.

to Section 656.20(g)(ii), Employer failed to include the wage offered in the posted job notice[3]; and (2) pursuant to Section 656.20(c)(8), Employer failed to conduct a good faith recruitment effort and failed to sufficiently document that the job opportunity had been and was clearly open to any qualified U.S. worker. Specifically, the CO noted that Employer did not conduct good faith recruitment efforts because 25 rejected applicants "were not advised of the specific reason for rejection nor why they were not qualified for the job," but were instead simply told that they "do not meet the qualifications for the position." AF 109-111. The CO also concluded that Employer's subsequent explanation for its rejection of nine of the U.S. applicants did not adequately establish that these workers were rejected for lawful, job-related reasons. AF 111.

Specifically, Applicant Duncan was rejected because there was "no Oracle Rdb evident," despite the fact that his cover letter specifically stated that his past experience included "maintenance and support of an Oracle db server including backups." The CO noted that there was no evidence that Applicant Duncan was ever interviewed. Applicants Hsieh and Jointer were rejected for the same reasons and the CO found no indication that either was interviewed. AF 111. Moreover, despite having six years of experience with "Oracle Relational Database Software," Employer rejected Applicant Jones due to a lack of "RDB support and maintenance experience." AF 111. Applicant Li was also rejected for lack of Oracle Rdb experience even though he possesses a masters' degree in computer science "focused on RDBMS and Web Technology researches, especially SQL, Oracle and Java." AF 111. Applicant Moore's resume listed Oracle 8i experience and service as an "Oracle application DBA, supporting Oracle's manufacturing service order," but he was rejected for having no Oracle Database experience. AF 111. Applicants Drew and Singer were also not interviewed because they had "no Oracle experience," despite specifically listing Oracle database experience on their respective resumes. AF 111.

[3] The CO instructed Employer to re-post the corrected job offer at its place of business for an additional 10 days. AF 110.

By letter dated June 9, 2004, Employer submitted its rebuttal material, in which it explained that the job offer was re-posted for ten business days with the salary range of $57,066 - $69,000 per year, and attempted to explain its reasons for rejecting nine seemingly qualified U.S. applicants. AF 22-108. Along with submitting a more detailed summary of its most recent recruitment results, Employer argued that Oracle Rdb is a "full-featured" database management system that is "completely different" from "Oracle's flag ship product, called Oracle, aka Oracle 8i, Oracle 9i and Oracle 10i." AF 23. According to Employer:

> [i]n order to bring someone into the company that does not have Oracle Rdb experience, it would take a minimum of 3 months for that individual to be useful. It would take an additional 6 to 12 months for that individual to be considered competent. Even at that point, with the position requiring 3 years of experience supporting Oracle Rdb, that individual would not have the depth of experience that they would have been obtained if they had been supporting the environment for the 3 year requirement. During the time of training, the company would have to spend considerable time in cross training and knowledge transfer. This would take a staffed employee away from their normal duties and would jeopardize the division's existing working environment which is already short staffed. In short, it is impractical and unfeasible to train any unqualified individuals for this position.

AF 23-24.

On June 25, 2004, the CO issued a Final Determination denying certification. AF 19. The CO accepted Employer's rebuttal regarding the re-posted job offer. However, the CO found that Employer did not sufficiently rebut his finding that Employer rejected qualified U.S. workers for other than lawful, job-related reasons. AF 20. Specifically, the CO noted that Employer "is interested only in the alien for which [sic] labor certification is being sought. It is not interested in hiring qualified U.S. workers." AF 20. The CO acknowledged that Employer "made attempts to contact each of the nine applicants" and interviewed 5 of them. Of the five applicants interviewed, four confirmed that they did not meet the minimum qualifications, and the other stated that he

was no longer interested in the position. The remaining four applicants could not be reached. AF 20. The CO denied certification and concluded:

> The employer was not given the opportunity to contact or re-contact any of the U.S. applicants, in the NOF. Just the mere fact that the employer decided to attempt a second recruitment effort, almost a year and ½ after the applicants responded with resumes, is not acceptable as evidence to rebut the Certifying Officer's initial findings. It just proves the Certifying Officer's contention that the employer's [sic] did not conduct a good faith recruitment effort, the employer did not verify if the U.S. applicants listed in the NOF, [sic] were qualified and available and willing to work at the time of the employer's first recruitment efforts. There is no reason for the employer to think that these applicants would still be willing and available for the employer's position a year and ½ later. The employer has failed to satisfactorily rebut the findings that several qualified U.S. workers responded to the employer's initial recruitment efforts in good faith, but were rejected for other than lawful job-related reasons.

AF 21.

On July 27, 2004, Employer requested administrative review of the CO's final determination. AF 1. The Board of Alien Labor Certification Appeals ("Board") docketed the case on August 18, 2004. In its Request for Review, Employer argued that all twenty-five applicants who responded to the initial job-posting were rejected for lawful, job-related reasons and were timely notified of the rejection. AF 2. More specifically, Employer argued that "any U.S. worker who came forth with the [listed] qualifications establishing that they could complete the core duties of the position in a normally acceptable manner would have been interviewed for the position and hired if ultimately determined qualified for the position." AF 3. Moreover, according to Employer, none of the U.S. applicants possessed the requisite combination of experience and education requested on the ETA 750A, to wit: a bachelor's degree or equivalent in computer science and *Oracle Rdb* experience. AF 3. According to Employer, an Oracle Rdb database system, which Employer describes as a "niche product," AF 5, is so different from and more complex than a general Oracle database system that an

individual with only general Oracle experience would not be "able to perform in the normally acceptable manner." AF 3-4.

DISCUSSION[4]

After Employer posted the job offer and conducted its own recruitment, there were twenty-five applicants for the position. The CO found that nine of those applicants appeared to be qualified to fill the position as described in the ETA 750A; however, none were interviewed. Instead, Employer rejected each of the nine seemingly qualified applicants because none "[met] the qualifications for the position." Without further investigating the applicants' qualifications or experience, Employer concluded that because their resumes did not specifically state that they possessed experience in "Oracle Rdb" database systems, they were unqualified.

The Board has consistently held that an employer can reject a U.S. worker solely on the basis of his or her resume where the resume indicates that the U.S. worker does not meet the job requirements. *Nancy, Ltd.*, 1988-INA-358 (Apr. 2, 1989) (*en banc*) citing *In re Anonymous Management*, 1987-INA-672 (Sept. 8, 1988) (*en banc*). However, where a U.S. worker's resume includes a broad range of relevant experience in various aspects of the position offered, an employer cannot reject the worker simply because the U.S. worker did not list a specific item or experience on his or her resume without further investigating the applicant's qualifications. *Nancy, Ltd.*, 1988-INA-358. In other words, because there is a "reasonable possibility" that many of the applicants in the instant matter, who possess years of IT experience, including experience with general Oracle software, might meet the job requirements of the position offered, "it was incumbent on the Employer to further investigate [the applicants'] qualifications," and "an employer cannot reject [those] applicant[s] without attempting to clarify [their] qualifications." *Id.* Here, Employer, having admitted that it did not interview nine of the

[4] Employer submitted exhibits along with its request for review. However, evidence submitted with the request for review will not be considered by the Board. *University of Texas at San Antonio*, 1988-INA-71 (May 9, 1988); *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 12, 1989) (*en banc*).

seemingly qualified applicants, clearly failed to meet the standard enunciated in *Nancy, Ltd.*

Nevertheless, we find that denial of the application was not appropriate in this case. This application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Although this panel has also recognized an exception to the *Compaq Computer* rule—that is, where an application is so fundamentally flawed that remand would be pointless, *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004)—we conclude that remand is appropriate given that Employer's "lack of good faith recruitment effort," as described by the CO, might easily be cured with supervised recruitment.

Furthermore, although not specifically addressed by the CO, we observe that Employer's application may be deficient in other ways. First, the position, as described in the ETA 750A, appears to be inappropriately tailored to meet the qualifications of the Alien in violation of 20 C.F.R. § 656.21(b)(5). To be sure, the Alien's qualifications listed on ETA 750B are remarkably identical to the description of the position included in the ETA 750A. Second, the record contains no documentation sufficient to determine whether the job requirements—i.e., the requirements underlying the basis for Employer's rejection of seemingly qualified U.S. workers—are unduly restrictive, and if so, whether Employer has established that any such unduly restrictive job requirement arises out of a business necessity. *See* 20 C.F.R. § 656.21(b)(2). Thus, prior to remanding this case for supervised recruitment to the State Workforce Agency ("SWA") or Backlog Processing Center, whichever is appropriate, the CO, within his discretion, may address whether the position is inappropriately tailored to the Alien's qualifications, and whether the job requirements are unduly restrictive.

Based on the foregoing, we **REMAND** this case to the CO for proceedings consistent with this decision.

SO ORDERED.

For the panel:

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John M. Vittone
Chief Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW
Suite 400 North
Washington, D.C. 20001-8002

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typed pages. Upon the granting of a petition the Board may order briefs.